plans to high volume users (*e.g.*, toll), or under other multiple-rate plans (such as peak and off-peak rates), States may reasonably find there are different avoided costs for the discounted and undiscounted services.[131] States may also provide that when a capability is offered both as a standalone retail service and as part of a package, a CLC should take the service by reselling the standalone offering and not by seeking unbundling of the feature from the package. Similarly, State policies may provide that there is no obligation for an incumbent LEC to create a new service just for resale.

Section 251 recognizes the special ability of the states to address such issues by prohibiting only unjust or unreasonably discriminatory conditions on resale. Section 251 also explicitly allows a State PUC to "prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers."[132] An example of a reasonable service use and eligibility limitation would be limiting the resale of residential dialtone to business customers. Another example would be the reasonable restrict of a resale service to a "retail" purpose. For example, if Centrex is resold, it must be resold as a business system, not a method of toll aggregation. Other examples include restricting the resale of "grandfathered" services (services that are not withdrawn from existing customers, but are not offered to new customers), and services offered at promotional rates. The Commission has long recognized that promotions encourage competition, encourage network usage, and

[131] States may distinguish between different services on the basis of function as well as cost. For purposes of detecting unjust or unreasonable discrimination, the prices of services that are "different in any material functional respect" are not comparable. *See Ad Hoc Telecommunications Users Committee v. FCC*, 680 F.2d 790 (D.C. Cir. 1982).

[132] Act, Section 251(c)(4)(B).

increase customer awareness of products and services.[133] Promotions are standard marketing tools for LECs and IXCs alike and generally suggest a high level of competition in the market. Requiring LECs to offer promotions for resale, particularly at wholesale rates, would effectively preclude LECs from using them. Thus, States should be permitted to restrict or limit the resale of promotions

The Commission has experience applying this approach. While the Commission has outlawed restrictions on the sharing and resale of AT&T's services,[134] it has also made clear that it did not intend "to eliminate all price discriminations," reasoning that "arbitrageurs ... are free to search out and capitalize upon attempts by the telephone company to charge different prices for the same product," forcing rates to reflect costs.[135] The Commission thus left the "essentially independent" issue of rates for resold interstate services to tariff proceedings.[136] It has expressly declined to interfere in the determination of rates for intrastate services subject to resale.[137] Applying these principles to local exchange

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[133] *See Policy and Rules Concerning Rates for Dominant Carriers*, 6 FCC Rcd 665, 670 (1991); 8 FCC Rcd 3715, 3716 n.11 (1993).

[134] *See Resale and Shared Use of Common Carrier Services and Facilities,* 60 F.C.C.2d 261 (1976), *mod'd on recon.,* 62 F.C.C.2d 588 (1977), *aff'd, AT&T v. FCC,* 572 F.2d 17 (2d. Cir.), *cert. denied,* 439 U.S. 875 (1978). See also *Resale and Shared Use of Common Carrier Domestic Public Switched Network Services*, 83 F.C.C.2d 167 (1980); and *Petitions for Rulemaking Concerning Proposed Changes to the Commission's Cellular Resale Policies*, 6 FCC Rcd 1719, 1721 (1991).

[135] *Resale and Shared Use of Common Carrier Domestic Public Switched Network Services*, 83 F.C.C.2d 167, 174, n.17, and 175, 176.

[136] *Id.* at 182.

[137] *See AT&T*, 94 F.C.C. 2d 1110 (1983)

resale would meet the Act's requirements, and would be consistent with its assigning the determination of avoided retail costs to the States.[138]

All LECs, not just incumbents, should be required to provide resale of retail services at wholesale prices to requesting telecommunications carriers. The spirit of the Act is that resale generally promotes competition. This is no less true of CLCs than of incumbent LECs.

A LEC should be able to withdraw a retail service at the same time as its wholesale version. The occasional withdrawal of services is normal business practice. LECs should be able to deploy their limited resources as they see fit. They should not, for the mere convenience of their competitors, be required to offer indefinitely services that have not met expectations or have outlived their usefulness

c. Pricing of Resale Services Should Not Require Discounts From Services Already Priced Below Cost.

Consistent with their expertise and the Act's express devolution of authority to them to "determine wholesale rates,"[139] the States should not be fettered with "national pricing policies" to "assist" their interpretation of the "avoided cost" standard of Section 252(d)(3). For retail services that have been required to be priced below cost, the Act does not require a discount. Indeed, absent recovery from universal service funding programs, to require local exchange resale prices to be set below cost would be confiscatory, and

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[138] *See* Act, Section 252(d)(3).

[139] *Id.*

therefore, both outside the boundaries of the Commission's authority[140] and contrary to the pro-competitive purposes of the Act.[141] Discounting of below-cost services would aggravate demand distortions already created by prices that deviate from costs, and create detrimental reliance by resellers on rates that need to be rebalanced.[142] The States may also be free to set resale prices to consider the potential for future stranded investment and the need for cost recovery when resellers migrate to their own facilities-based networks. As the Commission suggests (*Notice,* para. 180), States are entitled to consider wholesaling costs when setting the wholesale rate for resale. In no instance should avoided costs be deemed to "include a share of general overhead or 'mark-up'" (*id.*). No overhead is "avoided" when retail services are wholesaled.

d. <u>The Commission Should Not Permit the Use of Other Pricing Standards That Read The Resale Provisions Out of The Act</u>.

The Commission should not sanction arbitrage between the resale and the interconnection and unbundling provisions of the Act. Likewise, it would frustrate the Act if CLCs could purchase network elements separately and then reassemble them into retail

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140 *See FERC v. Pennzoil*, 439 U.S. 508, 518-19 (1979) and *Permian Basin Rate Cases* 390 U.S. 747 (1968) (area-wide natural gas prices not confiscatory where special relief available for wells not covering out-of-pocket expenses); *Northwestern Bell Tel. Co. v. Cascade Tel.*, 234 N.W.2d 130 (S. Ct. Iowa 1975); *Louisville & Nashville Railroad Co. v. Central Stock Yards Co.*, 212 U.S. 132 (1908) (forced interconnection of railroads violates 14th Amendment where compensation inadequate)

141 *See* Conference Report, p. 1.

142 A historical analogy would be the E.N.F.I.A. rates for access that AT&T's competitors enjoyed before, and for some time after divestiture. The transition to nondiscriminatory access charges for these competitors clouded their financial prospects and created tumult in the market -- as well as in the courts -- in the mid-1980s. *See MCI v. FCC*, 712 F.2d 517 (D.C. Cir. 1983), and *NARUC v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984).

packages that are provided solely over the LEC's network. CLCs could then evade the resale provision whenever it was to their advantage.

C. *Obligations Imposed on "Local Exchange Carriers" by Section 251(b) Should Generally Match Those Imposed On Incumbent LECs.*

1. Incumbent LEC Resale Obligations Should Apply To All LECs.

The Commission asks what types of restrictions on the resale of telecommunications would be "unreasonable" under Section 251(b)(1). We believe that in the interests of competition, any resale obligations that apply to incumbent LECs should apply to all local exchange carriers.

2. California Has Implemented Interim Number Portability for All LECs, and is Considering Efficient Methods for Implementing Long Term Number Portability. States Should Be Free To Select Efficient Long Term Number Portability Solutions.

California already requires interim number portability through remote call forwarding (RCF).[143] The Act specifically provides that RCF or direct inward dialing meet its requirements on an interim basis.[144] The CPUC has established a process to explore long-term solutions, such as database solutions.

While Sections 251(b)(2), 3(30), and 271(c) confirm the Commission is responsible for developing a long-term national number portability policy, they do not preclude this Commission from letting the States select the most effective short-term solutions for local conditions. Within reasonable limits, State authorities should be able to

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[143] *Competition for Local Exchange Service*, CPUC D.95-07-54 ("CPUC Initial Rules Decision") (July 24, 1995), slip op., App. A at 10 (Rule 6).

[144] Act, Section 271(c)(2)(B)(xi).

determine when and how long-term solutions should be implemented. After extensive workshops and hearings, the CPUC has approved rates and terms for interim number portability.[145] The CPUC is still considering permanent number portability solutions. Commission proposes to address number portability issues raised by the *1996 Act* in its ongoing proceeding on number portability (CC Docket No. 95-116).[146] We believe that the Commission should mandate the routing information needed to pass calls between networks (location routing number) and allow each carrier to determine the best triggering mechanism within its own network.

3. **Reciprocal Compensation for Call Termination Applies To Local Calls. Access Charges Should Continue To Apply To The Origination and Termination of Toll Traffic, and Cannot Be Replaced By "Unbundled Elements." Bill and Keep Arrangements Can Only Flow From Negotiated Agreements, Not Commission Order.**

The Commission seeks comment on whether "transport and termination of telecommunications" under section 251(b)(5) is limited to certain types of traffic. "The statutory provision appears at least to encompass telecommunications traffic that originates on the network of one LEC and terminates on the network of a competing LEC in the same local service area." (*Notice,* para. 230.) We agree. The statutory provision, however, extends only to traffic within the exchange. The "duty to establish reciprocal compensation arrangements" appears in Section 251(b) and applies to all local exchange carriers, not in Section 251(c), which applies to "the transmission and routing of telephone exchange service and exchange access."

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[145] *See Competition for Local Exchange Service*, CPUC D.96-04-052, slip op. (April 10, 1996).

[146] *Telephone Number Portability*, 10 FCC Rcd 12350 (1995).

Section 251(d)(3) also allows States to distinguish between traffic types in the establishment of reciprocal compensation arrangements. For the time being, the CPUC requires that "local traffic shall be terminated by the LEC for the CLC and by the CLC for the LEC" on the basis of "mutual exchange," also known as bill-and-keep. But the CPUC has held that for directory assistance calls, 800 number calls, busy line verification, and emergency interrupt calls, tariff charges apply. The CPUC requires that for toll calls, "CLCs shall pay terminating access charges based on the LECs' existing switched access tariffs."[147] The Commission may not preclude the enforcement of this CPUC rule for reciprocal compensation, since it clearly establishes "access and interconnection obligations of local exchange carriers,"is "consistent with the requirements" of Section 251, and does "not substantially prevent implementation of the requirements of [section 251] and the purposes of [part II of the 1996 Act]."[148]

The CPUC will review bill-and-keep by the end of 1996. As the Commission recognizes (*Notice*, para. 226), Section 252(b)(5) requires States to provide for the "mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier," and "determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls." That Section also provides that States may not "preclude arrangements" reached through negotiation "that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive

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[147] CPUC Initial Rules Decision, pp. 38-39, App. A at 11; CPUC Interconnection Decision, pp. 31-32, App. C at 13-14.

[148] *See* Act, Section 251(d)(3).

mutual recovery (such as bill-and-keep arrangements)." Finally, the Commission believes that it "is authorized to promulgate rules to guide the states in applying Section 252(d)." (*Notice,* para. 226.)

As we have pointed out, Section 2(b) reserves to the States all "jurisdiction with respect to ... charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier." Compensation for the transport and termination of local calls undoubtedly meets this description. Section 252(d) limits how States may determine such compensation, but it should not be construed to conflict with Section 2(b) by providing an offsetting expansion of the FCC's authority. Section 2(b) is "not only a substantive jurisdictional limitation on the FCC's power, but also a rule of statutory construction."[149] In addition, Section 251(d)(3)(A) prohibits the Commission from prescribing or enforcing any regulation that "preclude[s] the enforcement of any regulation, order, or policy of a State commission that ... establishes ... interconnection obligations of local exchange carriers," provided that the State rule is consistent with, and does not substantially prevent implementation of, the requirements of Section 251.[150] There is no question that the CPUC's regulations governing LEC-CLC interconnection compensation establish "interconnection obligations of local exchange carriers" within the meaning of Section 251(d)(3)(A).

The CPUC's compensation arrangements will implement the LECs' Section 251(b)(5) duty by dictating the charge (or directing the parties to negotiate a charge)

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[149] *Louisiana*, 476 U.S. at 355, 373 (1986).

[150] Act, Section 251(d)(3).

applicable to interconnection. No one arrangement will be ideal for all parties. Temporarily, the CPUC has adopted a "preferred outcome" of bill-and-keep for local calls, and access charges for toll calls. But as we have pointed out, two of five CLCs who have signed interconnection agreements opted for reciprocal compensation instead.

Even if the State did not have jurisdiction over reciprocal compensation for transport and termination, the Act makes clear that the Commission may not *mandate* bill-and-keep. If transport and termination is under Section 251(b)(5), then the pricing standards of Section 252(d)(2) come into play. These require "the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination" of calls that originate on the other's network, determined on the basis "of a reasonable approximation of the additional cost of terminating such calls." In other words, there must be a recovery of costs. Although the parties may voluntarily *agree* to "waive mutual recovery,"[151] the Commission has no authority to require such an arrangement.

The Commission requests comment on whether telecommunications traffic passing between neighboring LECs that do not compete with one another qualifies as "transport and termination of telecommunications" under Section 251(b)(5). (*Notice,* para. 231.) In context, the statutory requirements that apply to transport and termination of interconnecting LECs govern only the traffic of LECs competing in the same service areas. The requirements imposed on LECs by Section 251(b), which include reciprocal compensation for the transport and termination of traffic, make no sense except in the context of LECs offering service in the same geographic area, because they are relevant only to the

[151] *Id.* at Section 252(d)(2)(B)(i).

competitive relationship between such carriers. In contrast to the express goal to promote local exchange competition, there is no evidence that Congress intended to rewrite the thousands of long-standing traffic exchange agreements between the more than fourteen hundred LECs serving separate franchise areas in the nation.

The Commission also requests comment on certain pricing issues, including: whether the Commission should require that states price facilities dedicated to an interconnecting carrier, such as transport links to a meet point, on a flat rated basis (*Notice,* para. 232); "whether the pricing provisions in Section 252(d) should be viewed independently, or whether they should be considered together ... [b]ecause the statute uses different language for interconnection and unbundled elements and transport and termination of traffic." "This would require," observes the Commission, "that each incumbent LEC offering be identified as falling within one particular category." (*Notice,* para. 232.)

The statute's use of different pricing provisions in Section 252 for interconnection, unbundled elements, resale, and compensation for transport and termination certainly corroborates that they are different offerings. But Congress manifested an equal intention that the differing prices and terms of interconnection, unbundled elements, resale services, and transport and termination should be determined by the States. It placed all the provisions for terms and prices in Section 252, not in Section 251, and in every case said that "a State commission" shall determine them.[152] If instances arise where one intrastate offering is difficult to distinguish from another, it would certainly not discomfit any State commissions, which have had for years to define intrastate offerings and establish rational

[152] *See id.* at Section 252(d)(1), (d)(2)(A), and (d)(3).

differences between rates. State commissions need no guidance in this task. They have decades of expertise and far more effective tools to deal with such fact-rich adjudications than the FCC. It would be impossible for this Commission to define offerings or set prices that would not ride roughshod over the States and devastate the balance between local exchange carriers' revenues and their costs.

The Commission says that "[i]n certain instances, ... transport and termination under reciprocal compensation may be difficult or impossible to distinguish from unbundled elements. For example, transport between an incumbent LEC's central office and an interconnector's network could be considered either of the foregoing." It seeks comment on "whether it will be possible to distinguish transport and termination from the other categories of service," and "whether, if two different pricing rules could apply to a particular situation, we should require that the new entrant be able to choose between them." (*Notice,* para. 233.)

There is no reason for concern that it will be difficult to distinguish transport and termination from unbundled network elements. First of all, the example given by the Commission -- transport between an incumbent LEC's CO and an interconnector's network -- appears to be interconnection, not transport and termination (assuming the traffic does not traverse other LEC switches before reaching the interconnector's network). Transport and termination, in our understanding, means that Carrier A takes the local traffic from the point of interconnection with Carrier B's network and delivers it to the called party, *where the called party is a customer of Carrier A* In such a case, Carrier B cannot use unbundled network elements to take traffic to the customer, because Carrier B would not be offering that customer an exchange service. If, on the other hand, the called party subscribes to Carrier B, transport and termination would not apply because no traffic is interchanged between A's and B's network. In that situation, Carrier B could use unbundled network elements to complete the local call, as long as it also uses some of its own facilities or equipment (see above, §I.B.2.c.3). If it does, then the pricing standard in Section 252(d)(2) for transport and termination charges will undoubtedly apply. Section 252(d)(2) does not rule out the use of access charges for transport and termination of local calls. In fact, Section 252(d)(2)(B)(ii) would preclude the Commission or any State from flatly prohibiting the use of access charges for transport and termination of local calls.

D. *Telecommunications Carriers Under Section 251(a) Are Those Providers Who Offer Telecommunication Services For A Fee*

The Commission tentatively concludes that "to the extent that a carrier is engaged in providing for a fee local, interexchange, or international basic services, directly to the public or to such classes of users as to be effectively available directly to the public, that carrier falls within the definition of 'telecommunications carrier.'" The Commission seeks comment on which carriers are included under this definition, and on whether a provider may qualify as a telecommunications carrier for some purposes but not for others.

Because "telecommunications carrier" is defined in Section 3(44) in the same way as "common carrier," except that aggregators and satellite service providers are excluded, private networks may not make requests under Section 251.

E. *Exemptions, Suspensions, And Modifications Should Largely Be Left To The States*

Recognizing that Section 251(f) imposes specific and detailed obligations on the States to deal with requests for interconnection received by exempt rural LECs and petitions for modification or suspension of the requirements of Sections 252(b) and (c) filed by small LECs with fewer than 2% of subscriber lines, nationwide, the Commission requests comment on whether it should establish standards that would assist the States in satisfying these obligations under Section 251(f). (*Notice*, para. 261.) We submit the statutory provisions are effectively self-executing in their mandate to the States, and they do not contemplate FCC intervention at this time. The State commissions obviously provide the best fora for considering local conditions affecting competitive opportunities, and their discretion should not be prematurely constrained by the Commission.

II. PROVISIONS OF SECTION 252

A. *The Commission's Role In State Arbitration Proceedings Should, As a Practical Matter, Rarely Arise. When Intervention Is Required, the Commission Must Act On Behalf Of the State.*

The Commission asks whether it should establish regulations pursuant to section 252(e)(5), and requests comment on what constitutes notice of failure to act. (*Notice*, paras. 265-66.) We do not believe this is an immediate concern. But it is clear from the statute that the Commission's responsibilities do not attach in the case of agreements deemed approved by the passage of time pursuant to Section 252(e)(4). In such situations, there is no action that a State has failed to take, hence no role for the Commission to play. The remedy for any parties aggrieved by the automatic approval is to be found in a Federal district court pursuant to Section 252(e)(6).

The Commission also asks whether, if it assumes the responsibilities of the State commission, it is "bound by all of the laws and standards that would have applied to the state commission." (*Notice,* para. 266.) As we have already stated, the statute requires the FCC to "act for" and "assume the responsibility" of the State, in effect, to be the agent of the State and enforce the State's laws and rules even if they conflict with the FCC's.

The Commission also says that once it assumes responsibility under 252(e)(5), "there is no specific provision by which authority reverts back to the state commission." It asks whether "once the Commission assumes responsibility under section 252(e)(5), it retains jurisdiction over that matter or proceeding." The short answer is no. The statute provides that "[*a*]*ny* interconnection agreement adopted by .. arbitration shall be submitted for approval to the State commission." Thus, if the FCC presides over the arbitration of an agreement, it is to submit the agreement to the State and authority reverts back to the State commission to review it. If the State fails to approve or disapprove the arbitrated agreement within thirty days, it is deemed approved under Section 252(e)(4).

B. ***It Is At Best Premature For The Commission To Adopt Rules for Adjudicating Disputes Under Section 252(i). While LECs Must Make Available To All Requesting Carriers Interconnection Terms Reached Through Agreement, This Requirement Should Apply Only To Similarly Situated Carriers.***

The Commission asks whether it should adopt standards for resolving disputes under Section 252(i) in the event that it must assume the State's responsibilities pursuant to Section 252(e)(5). The Commission asks whether interconnection, services, or network elements provided under a State-approved Section 252 agreement must be made available to any requesting telecommunications carrier (*Notice*, para. 270.)

On the question of whether the Commission should adopt standards for resolving disputes, we urge the Commission to resist this impulse. Arbitrations contemplated by Section 252 are intended to be conducted quickly and decided on the basis of two sets of documents as specified in Section 252(b). For now these provisions appear to be wholly adequate for any disputes that may arise under 252(i).

Consistent with the statute, agreements should be made available only to similarly situated carriers, that is, not to evade access charges, but for the provision of exchange and exchange access service by a competing LEC. Moreover, incumbent LECs should not be burdened with unreasonable demands for the creation or deployment of new services or facilities and should be assured full compensation for any required activities. Further, various elements in interconnection agreements are subject to cost-based pricing standards under the Act. Satisfying these limitations necessarily requires that the requesting carrier be similarly situated vis-a-vis the original party before it may obtain service under an existing interconnection agreement. Thus, if the requesting party is not a competing LEC whose exchange service needs can be met with the same technology and at the same costs, it is not entitled to the benefit of any prior agreement.

III. CONCLUSION

For the above reasons, we urge the Commission to adopt our proposals.

Respectfully submitted,

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